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Procedure: Civil Procedure

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PROCEDURE

CIVIL PROCEDURE

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JUSTICIABILITY

A provision of the Louisiana Trust Code authorizes a trustee to apply to the court for instructions concerning the trust instrument or the administration of the trust. Under certain circumstances, the order may be obtained in an ex parte proceeding.[1] In a recent case, a district judge refused a request for such instructions, holding that the statute which authorized the ex parte proceeding was unconstitutional because it required the court to render an advisory opinion in violation of the Louisiana Constitution of 1921. In an opinion that casts doubt upon the viability of the doctrine of justiciability in Louisiana law, the Louisiana Supreme Court reversed,[2] holding the statute constitutional.

Ordinarily, a dispute is justiciable if it may be resolved through the judicial process; a dispute is non-justiciable if its resolution has been committed to another branch of the government or to the people through the ballot box, or if the particular dispute is not presented in a manner that can be resolved through the judicial process although its resolution has been committed to the judiciary. This last requirement usually means that truly adverse parties with a genuine interest in the outcome of the dispute must be before the court.[3] The lack of truly adverse parties is reflected in the doctrine of "standing," *i.e.*, the requirement that the parties have sufficient interest in the outcome to provide the necessary adversity. The rule also prohibits a court from rendering a declaratory judgment that does not have a sufficiently adverse effect upon the parties; when the requisite adverse effect is absent, the suit for declaratory judgment is said to be one seeking an advisory opinion, and the controversy is deemed non-justiciable. Whether the requisite adversity existed apparently troubled the trial judge in *In re Gulf Oxygen Welder's*

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1. LA. R.S. 9:2233 (Supp. 1964).

2. *In re* Gulf Oxygen Welder's Supply Profit Sharing Plan & Trust Agreement, 297 So. 2d 663 (La. 1974). For a discussion of this case, see Note, 35 LA. L. REV. 898 (1975).

3. Petition of Sewerage & Water Bd., 248 La. 169, 177 So. 2d 276 (1965).

Supply Profit Sharing Plan and Trust Agreement, inasmuch as he relied upon cases holding that certain claims for declaratory judgments were non-justiciable advisory opinions.[4]

The majority opinion of the supreme court first distinguished the declaratory judgment cases as being founded upon the declaratory judgment statute, and not upon any constitutional requirement. The court then distinguished the constitutional limits upon the state judiciary from those upon the federal judiciary, pointing out that while the federal judiciary may exercise only those powers granted under the United States Constitution, all powers not reserved to the people repose in the state government. Since the legislature possesses the entire legislative power not reserved to the people by the Louisiana Constitution, the court reasoned, the legislature can delegate to the judiciary the exercise of any function unless the exercise is expressly prohibited by the constitution. Justice Tate then determined that since the rendition of an ex parte order is a judicial function, it satisfies the requirement of justiciability.[5]

The opinion leaves the reader in doubt as to the logic of the majority. Perhaps it adopted the position that an ex parte proceeding is a judicial function, and thus the request for an ex parte order under the trust code does not require the court to undertake a non-justiciable function. Certainly, there is support in the opinion for that view.[6] Or it may have concluded that the doctrine of justiciability has no place in Louisiana law, that a Louisiana court may exercise any function which the legislature assigns to it, provided that such an exercise is not expressly prohibited by the state constitution. Certainly some language in the opinion supports that view.[7]

The court could have reached its conclusion without inflicting any damage to the developing doctrine of justiciability. In

4. 297 So. 2d at 665.

5. *Id.* at 666.

6. "We find no authority that such [granting of instructions by the district court as to doubtful legal questions arising in connection with the trust instrument] is not a judicial function, whatever discretion . . . the court may have in its exercise or whether to exercise it." *Id.* at 665-66.

7. "In its exercise of the entire legislative power of the state, the legislature may enact any legislation that the state constitution does not prohibit." *Id.* at 665. "None of these provisions, [La. Const. arts. II, VII (1921)], nor any other we can find in our state constitution, prohibit the legislature from vesting jurisdiction in the district courts to make judicial interpretations on the application of trustees [of trust instruments]." *Id.* at 666.

the United States, courts look to the adversaries for the marshalling of the facts and the applicable law; thus truly adverse parties usually are essential to a just decision. Although the trustee is unopposed in the ex parte instruction proceeding, he remains liable to the settlor and beneficiaries for erroneous or negligent acts, including the manner of presentation of the case for the ex parte order.[8] In addition, the ex parte order will bar the trustee from seeking indemnification from the third party with whom he has dealt.[9] These unusual circumstances should assure that the trustee will be properly motivated to present to the court all of the facts and law available to him surrounding the order. Thus, the requirements of the adversary system may be satisfied although the proceeding is ex parte. Furthermore, as Justice Tate carefully observed in the majority opinion, the court may obtain additional information before granting the order by giving notice to the beneficiary or settlor of the pendency of the proceeding, or by appointing an expert to assist it.

While the decision appears correct, unfortunately the court failed to set forth clearly the doctrine upon which it is based. While the case was decided under the constitution of 1921, the similarity of the language therein to the wording of the constitution of 1974 probably would not dictate a different result.[10]

JURISDICTION

The Louisiana Code of Civil Procedure grants jurisdiction to Louisiana courts over custody of minors in those cases in which the child is "domiciled in, or is in," the state.[11] The exercise of that jurisdiction has presented significant legal issues to Louisiana courts in the past year because of the increasing mobility of the American people. One issue is the extent to which a Louisiana court may continue to exercise jurisdiction over a custody proceeding involving a child who is no longer present or domiciled in the state, but who was in the state at the time jurisdiction originally attached. Since the domicile of the child is that of the parent to whom custody is granted,[12] the child is no longer in or domiciled in Louisiana

8. LA. R.S. 9:2233(B) (Supp. 1964).

9. *Id.*

10. LA. CONST. art. II, §§ 1 & 2; LA, CONST. art. V, § 16. *See* Note, 35 LA. L. REV. 898, 903-04 (1975).

11. LA. CODE CIV. P. art. 10(5).

12. Person v. Person, 172 La. 740, 135 So. 225 (1931); Stewart v. Stewart, 233 So. 2d 305 (La. App. 1st Cir. 1970). *See* LA. CIV. CODE art. 39.

when the parent to whom custody is granted establishes a domicile in another state, and there is no independent jurisdiction for custody purposes.

The Louisiana Supreme Court has held that when a court acquires jurisdiction to render a money judgment for alimony or child support, *i.e.*, personal jurisdiction over the husband, jurisdiction continues even though the defendant is no longer within the state or otherwise amenable to suit for a money judgment in a Louisiana forum.[13] Does this concept of "continuing jurisdiction" extend to a custody decree, which, like alimony or child support, is a modifiable family law judgment? The first and second circuits have answered in the negative.[14] The fourth circuit has held that jurisdiction does continue,[15] and the Third Circuit Court of Appeal joined in that position during the last term.[16]

It is unclear whether the exercise of continuing jurisdiction in custody matters violates due process. The United States Supreme Court apparently has not passed upon the matter, but decisions of lower courts support the exercise of such jurisdiction.[17] It may be desirable that Louisiana courts possess continuing jurisdiction, but it is important that they exercise the power sparingly. The judgment might not be entitled to full faith and credit in the new state of domicile of the parent and child.[18] The judgment may be effective in Louisiana,[19] but the child will be outside the state, and Louisiana's residual interest as the place of the divorce or separation and, perhaps, of the marriage, will be outweighed by the interests of a sister state which is the domicile of the child and of one of the parents. Comity dictates a discriminating exercise of continuing jurisdiction in such a child custody case.

If the child is domiciled elsewhere but physically present in the state, jurisdiction for custody purposes undoubtedly exists. If the child is only transiently in the state, and there is

13. Imperial v. Hardy, 302 So. 2d 5 (La. 1974).

14. Stewart v. Stewart, 233 So. 2d 305 (La. App. 1st Cir. 1970); Nowlin v. McGee, 180 So. 2d 72 (La. App. 2d Cir. 1965), *cert. denied*, 248 La. 527, 180 So. 2d 541 (1965).

15. Pattison v. Pattison, 208 So. 2d 395 (La. App. 4th Cir. 1968).

16. Lynn v. Lynn, 316 So. 2d 445 (La. App. 3d Cir. 1975).

17. Corkill v. Cloninger, 454 P.2d 911 (Mont. 1969). *See also* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 195 (1971) [hereinafter cited as WEINTRAUB].

18. Kovacs v. Brewer, 356 U.S. 604 (1958); WEINTRAUB at 196-97.

19. WEINTRAUB at 196-97.

no emergency involving his welfare, the state has a minimal interest in the custody controversy. The state of domicile of the child ordinarily will have a greater interest, and comity dictates that Louisiana should recognize the paramount interest of a sister state.

The Fourth Circuit Court of Appeal reached the proper result in two cases during the most recent term, but a dispute developed over the theory to be applied to reach the result. In the first case, *Smith v. Ford*,[20] the majority of a three-judge panel wrote that if a child is only transiently in the state

> the jurisdiction [conferred by article 10(5)] . . . is intended to be exercised, and with reasonable expectation of being respected in other states can be exercised, only when some acute exigency obliges the state to intervene for the immediate necessities of the child's welfare. . . . [21]

The language indicating a lack of jurisdiction prompted the majority of the fourth circuit, sitting en banc, to overrule *Smith* in *Rafferty v. Rafferty*.[22] The majority in *Rafferty* correctly pointed out that the question is not one of jurisdiction, but one of the extent to which comity might dictate that the Louisiana court withhold exercise of the jurisdiction. *Rafferty* explains that while the Louisiana court has jurisdiction, the court must balance the competing interests of the two states to determine whether Louisiana should give full faith and credit to the foreign decree or make an independent determination of custody.

Both cases were correctly decided. In *Smith* the children had been brought to Louisiana by the father against the wishes of the mother, to whom custody had been awarded. The Louisiana interest was minimal vis-à-vis the state of domicile and an exercise of jurisdiction by this state could have been offensive to the state of domicile. In *Rafferty*, the mother with custody had brought the children to Louisiana from Texas and left them with her parents for about two months while she established a new domicile in Massachusetts. Given the minimal interests of the other states involved and the manner and length of the children's stay in Louisiana, exercise of jurisdiction was proper.

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20. 288 So. 2d 71 (La. App. 4th Cir. 1974).
21. *Id.* at 73.
22. 313 So. 2d 356 (La. App. 4th Cir. 1975).

The recent Louisiana Supreme Court decision of *State ex rel. King*[23] supports the doctrine of abstention when the child is transiently within the state and there is no compelling need for Louisiana to exercise jurisdiction. In *King* the parents were divorced in New York and the mother was awarded custody; the father moved to New Orleans and subsequently removed the children to Louisiana without the mother's consent. The father then brought a proceeding in Louisiana seeking a declaration under Louisiana R.S. 13:1570 that the children were neglected. The supreme court held that jurisdiction under the statute existed only when the child was domiciled in or found within the state and the neglect took place within the state. Finding that the children had not been neglected within Louisiana, it dismissed the father's claim. In suggesting alternative remedies that could have been available to the father, the court suggested a custody action in New York but noticeably omitted any reference to such an action in a Louisiana court. This obvious omission supports the theory that Louisiana courts, in the absence of some compelling urgency, should abstain from the exercise of jurisdiction over children who are temporarily within the state against the wishes of the custodial parent. Abstention will not be satisfactory, however, in those cases when it is necessary to utilize the judicial process to return the physical custody to the custodial parent, and in such a situation the court should follow the procedure outlined by the majority in *Rafferty*.

Ascertainment of the theory upon which to base the conclusion presents a more difficult problem. Clearly the Louisiana court has jurisdiction. If the court abstains, or applies the doctrine of *forum non conveniens*, neither party will be able to utilize a Louisiana court to enforce its claim to custody. Such a result may be satisfactory unless the circumstances dictate that the state's judicial machinery should be utilized to return the physical custody to the custodial parent. In the latter case, the court may exercise jurisdiction and (a) determine that it is required by the United States Constitution to grant full faith and credit to the foreign custody decree, or (b) determine that since there are changed circumstances it need not grant full faith and credit to the foreign decree, but conclude that it is nevertheless compelled by comity to enforce the foreign decree, or (c) disregard the

23. 310 So. 2d 614 (La. 1975).

foreign decree and make an independent decision as to custody.

Louisiana Code of Civil Procedure article 5091 provides that a Louisiana court may appoint an attorney to represent an absentee or a non-resident over whom it has jurisdiction if the defendant has not been served with process and has not made a general appearance. The omnibus long arm statute provides that a Louisiana court has jurisdiction over a non-resident who commits certain acts having an effect inside the state.[24] It also provides that service under the long arm statute shall be by registered mail or by actual delivery of a copy to the defendant.[25] In *Ray v. South Central Bell Telephone Co.*,[26] the Louisiana Supreme Court held that the method of service prescribed in the long arm statute is exclusive and that when jurisdiction is obtained under that statute, service may not be effected upon an attorney pursuant to article 5091.

While the court's interpretation seems proper, the result may be unfortunate. If the defendant is subject to jurisdiction *in personam*, appointment of an attorney at law charged with the duties of locating and informing the defendant of the pendency of the action, and urging on behalf of the defendant all defenses known to the attorney[27] seems to provide the fair notice required by the United States Constitution. The desirability of an alternate procedure should be obvious in the light of the difficulties that may ensue in service by mail or through a foreign process server. Hopefully, the legislature will authorize service upon an attorney when jurisdiction is obtained under the omnibus long arm statute.

CLASS ACTIONS

A class action may be maintained in a Louisiana state court if joinder is impracticable, an adequate representative of the class is before the court, and the character of the right sought to be enforced by or against the class is common.[28] As with other procedural devices phrased in broad conceptual terms by the redactors of the Code of Civil Procedure,[29] the

24. LA. R.S. 13:3201 (Supp. 1964).
25. LA. R.S. 13:3204 (Supp. 1964).
26. 315 So. 2d 759 (La. 1975).
27. LA. CODE CIV. P. arts. 5094-95.
28. *Id.* arts. 591(1), 592.
29. *See, e.g.*, LA. CODE CIV. P. art. 463. *See also* State, Dep't of Hwys. v. LamarAdv. Co. of La., Inc., 279 So. 2d 671 (La. 1973).

lower courts have had difficulty in determining when the character of a right is common. The First Circuit Court of Appeal has held that the right is of common character when the parties can be joined under the provisions of article 463,[30] while the fourth circuit has held that the right is not common unless the parties are necessary or indispensable under articles 641 and 642.[31]

In *Stevens v. Board of Trustees of the Police Pension Fund of the City of Shreveport*,[32] the second circuit joined the fourth circuit view. On appeal the Louisiana Supreme Court reversed.[33] Justice Tate, writing for three members of the court, found that the character of the right sought to be enforced is common when there is a "common-based right" and the trial judge determines that a class action would clearly be more useful than other available procedures for the litigation of the claims.

The opinion indicates that a "common-based right" will exist when the claims of the members of the class share a common question of law or fact. If they do, Justice Tate writes, then the court should determine whether the maintenance of the action would promote judicial efficiency, provide fairness to the parties, or foster some substantive state policy. Among the facts relevant to the policy decision are the size of the individual claims, the interest of the members in prosecuting separate suits, and the probable precedential effect of separate decisions upon the remaining claims.[34] Two members of the court concurred in the result, one recused, and one dissented. While the opinion can not be treated as authoritative under these circumstances, it reflects two desirable trends in judicial thinking: a continued move toward the functional—and away from the conceptual—approach in defining procedural devices, and a recognition that since the federal class action is practically unavailable for the enforcement of state-created rights, a broad state class action is desirable.[35]

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30. Verdin v. Thomas, 191 So. 2d 646 (La. App. 1st Cir. 1966).

31. Caswell v. Reserve Nat'l Ins. Co., 234 So. 2d 250 (La. App. 4th Cir. 1970).

32. 295 So. 2d 36 (La. App. 2d Cir. 1974), *rev'd*, 309 So. 2d 144 (La. 1975).

33. 309 So. 2d 144 (La. 1975).

34. *Id.* at 151.

35. The United States Supreme Court has ruled that a plaintiff in a class action may not aggregate his claim with the claims of other members of the class to satisfy the requisite jurisdictional amount unless the claims are

CONTINUANCES

Louisiana Code of Civil Procedure article 1602 prescribes certain mandatory grounds for a continuance, including the absence of a material witness. Article 1601 provides that in any case, a continuance may also be granted "if there is good ground therefor." Both of these provisions were applied by the Louisiana appellate courts in significant decisions during the recent term.

In *Sauce v. Bussell*[36] the supreme court, while emphasizing the "wide discretion" granted to the trial judge under article 1601 and reaffirming that his decision should not be disturbed on appeal in the absence of a clear showing of abuse, reversed the trial judge's refusal to grant a continuance. The court determined that the plaintiffs seeking a continuance, two of eleven in consolidated cases, had not previously engaged in delay tactics during the course of the proceeding and that the illness of one of them was such that he had been unable to assist his counsel in pre-trial preparation and would be unable to appear at the trial. This plaintiff's testimony was "critical" to both of the cases. Finally, although the trial judge refused the continuance to the plaintiffs and dismissed their suits with prejudice, he granted continuances to the remaining consolidated cases set for trial on the same day.[37] The supreme court considered these circumstances an "extreme case"; the denial of a continuance amounted to "an injustice" constituting an abuse of the trial court's discretion. Justice Summers, in dissent, was impressed by additional circumstances: the motion for continuance was filed only after the court on the same day had denied a motion to stay the proceeding in order to permit litigation of a similar claim in another court; other co-plaintiffs who were physically able to attend were not present when the matter was

"joint and common." *See* Synder v. Harris, 394 U.S. 332 (1969). It also has ruled that when the claim of the named representative of the class exceeds the jurisdictional amount, the claims of other members of the class which do not meet the required amount in controversy may not be adjudicated by the federal court under ancillary jurisdiction. *See* Zahn v. International Paper Co., 414 U.S. 291 (1973). The practical effect of these decisions is to bar from federal court most class actions in which jurisdiction is based upon diversity of citizenship, *i.e.*, those in which state-created claims are sought to be enforced, inasmuch as the claim of each member of the class must exceed $10,000.

36. 298 So. 2d 832 (La. 1974).

37. *Id.* at 834-35.

called for trial, and counsel for plaintiff had not filed a required pre-trial memorandum.[38]

Generally, Louisiana attorneys consider the subpoena of a witness an essential prerequisite to seeking a continuance on the peremptory ground of the absence of that witness at the trial. Article 1602, however, does not require a subpoena, but merely provides that the witness have "absented himself without the contrivance of the party applying for a continuance." While the subpoena of a witness who fails to appear might be sufficient grounds for a continuance in itself, the Fourth Circuit Court of Appeal has held that the lack of a subpoena will not preclude the granting of a continuance. In *Loicano v. Maryland Casualty Insurance Co.*[39] the court ruled that when the party seeking the continuance was reasonable in his belief that the witness would appear without being subpoenaed, the trial was continued for the taking of other testimony, and there was no unfair surprise to the opposing party, the trial court erred in failing to grant a continuance to permit the party to obtain the testimony of the absent witness.

The *Sauce* and *Loicano* cases reflect careful consideration by the courts of those policies which procedural rules are designed to promote: judicial efficiency and fairness to the parties. In both cases, no substantial judicial efficiency could be achieved by refusing the continuance, no unfair prejudice would result to the opponent from granting the continuance and the conduct of the party seeking the relief had been reasonable under the circumstances.

DISCOVERY

Louisiana discovery rules permit a litigant to obtain a court order requiring a party whose mental or physical condition is in controversy to submit to an examination by a physician appointed by the court.[40] Louisiana Code of Civil Procedure article 1493 provides that the order must specify the manner and conditions of the examinations. In *Robin v. Associated Indemnity Co.*,[41] the Louisiana Supreme Court granted writs to review such an order by a trial judge. One

38. *Id.* at 839 (Summers, J., dissenting).
39. 301 So. 2d 897 (La. App. 4th Cir. 1974).
40. LA. CODE CIV. P. art. 1493.
41. 297 So. 2d 427 (La. 1974).

issue before the court was whether the physician would be permitted to question the party examined about matters that bore upon the question of liability. The court, recognizing that an inquiry into the manner in which the accident occurred might be necessary to a proper examination and diagnosis, deemed appropriate an order prohibiting the examiner from asking questions "unnecessary to the medical examination and tending only toward a determination of questions of liability."[42] The court also held that when an examiner records his interrogation of the party examined and a controversy is likely to develop over the manner in which the examiner conducts the examination, an order requiring the examiner to preserve the recordings and produce them when he testifies is proper.

The court also ruled that while the party to be examined does not have the right to have his attorney present during the examination, the trial court may permit him to be present. The factors which the court indicated would bear upon such a decision include the extent to which the presence of counsel might destroy the effectiveness of the examination, as in psychiatric examination, and the extent to which his presence may be needed to protect the party examined. In this latter respect the court contrasted situations in which the court suggested the examiner and those in which the opposing party made the selection.[43]

Louisiana Code of Civil Procedure article 1452 provides that a party who is served with notice of the taking of a deposition may apply to the court for a protective order, and if the court finds that relief is proper, it may render any order which justice requires to protect a party from undue expense. In *Madison v. Travelers Insurance Co.*,[44] the Louisiana Supreme Court held that this provision gives the trial judge discretion to require a party seeking to take depositions outside Louisiana to pay the reasonable travel and lodging expenses of opposing attorneys. There is nothing in the opinion indicating that the discretion would not extend to requiring payment of the same expenses for depositions within the state but outside the judicial district in which the case is pending, and

42. *Id.* at 430.

43. Although it did not specifically pass upon the question, the court implied that the party requesting an examination of an opposing party does not have the right to select the examiner. *Id.* at 430.

44. 308 So. 2d 784 (La. 1975).

a tenable argument could be made for such an order. Since a witness who resides within the state can be compelled to attend the trial at any other place in the state, the deposition serves primarily to aid the party who initiates its taking in his investigation of the case. Under those circumstances, it may be reasonable to require that party to pay the expenses of the opposing party who must attend or run the risk of having the testimony used against him in the event of subsequent death or unavailability of the witness.[45]

JURY TRIALS

While Louisiana law generally permits jury trials in civil cases, statutory provisions prohibit such trials in enumerated types of actions.[46] When a single action is asserted in which trial by jury is authorized, the litigants may elect to have some of the issues determined by the jury and others by the judge; all determinations are made after a single trial on the merits.[47] Difficulty arises, however, upon the joinder of separate actions, only one of which is triable by a jury. If one action is a principal demand and the other an incidental demand, the code expressly provides an answer: the nature of the principal demand determines whether any issue in an incidental demand is triable by jury.[48] But what if both are principal demands, cumulated under the provisions of articles 462 or 463? Should there be a single trial by a judge, a single trial by a jury, separate trials, or a single trial in which the judge determines one action and the jury the other?

In a 1969 case, *Jobe v. Hodge*,[49] the Louisiana Supreme Court selected the first alternative. There, a public body was named a co-defendant along with an individual defendant; plaintiff was entitled to a jury trial against the individual, but not against the public body. The supreme court held that since there could not be a jury trial in the claim against the public body and article 1735 required that there be but one trial, then both actions must be tried to the judge.

The supreme court overruled the much criticized *Jobe* decision in *Champagne v. American Southern Insurance Co.*[50]

45. LA. CODE CIV. P. art. 1428(3).
46. *Id.* arts. 1731, 1733.
47. *Id.* arts. 1732, 1734-35.
48. *Id.* art. 1731.
49. 253 La. 483, 218 So. 2d 566 (1969).
50. 295 So. 2d 437 (La. 1974).

The court held that when an action triable to a jury is properly joined under articles 462 or 463 with one triable by a judge, the court should conduct a single trial, satisfying the limitation of article 1735, but the jury should determine the claims and issues properly committed to it while the judge should decide the other issues and claims.

EXECUTORY PROCESS

Procedural due process of law in a civil action includes fair notice and an opportunity to be heard before there is any substantial deprivation of a property right. In a line of cases beginning with *Sniadach v. Family Finance Corp.*[51] in 1969, the United States Supreme Court has held that some pre-judgment seizures, including the common law action of replevin, violate due process because the defendant may be deprived of a property right without adequate notice and a prior opportunity to be heard. The decisions cast doubt upon Louisiana procedures authorizing pre-judgment seizure, including executory process, sequestration and attachment.

In *Mitchell v. W.T. Grant Co.*,[52] the United States Supreme Court ruled the Louisiana sequestration procedure did not violate due process. The court found four distinctions between Louisiana's sequestration procedure and the replevin action held unconstitutional in *Fuentes v. Shevin*,[53] one of which was that the Florida replevin procedure used in *Fuentes* could issue by order of the clerk of court, while the Louisiana sequestration could issue only upon order of a judge.[54] Shortly thereafter, the United States Supreme Court dismissed another action in which the Louisiana Supreme Court had upheld Louisiana's executory process, noting that it did not involve a "substantial federal question."[55] In *Mitchell* the writ of sequestration had been issued in Orleans parish, in which all sequestration orders must be signed by the judge; in the state's remaining parishes, however, a writ of sequestration or a writ of executory process may issue upon an order signed by the clerk only.[56] This procedure

51. 395 U.S. 337 (1969).

52. 416 U.S. 600 (1974). For a discussion of this case, see Note, 35 LA. L. REV. 221 (1974).

53. 407 U.S. 67 (1972).

54. For a listing of the four distinctions, see Note, 35 LA. L. REV. 221, 227 (1974).

55. Carmack v. Buckner, 417 U.S. 901 (1974).

56. LA. CODE CIV. P. art. 283. "The clerk of a district court may sign . . .

raised the question whether the Louisiana executory and sequestration procedures in the remaining parishes violated due process in all cases or at least in those when the writ is issued upon order signed by the clerk and not the judge.

The matter reached the Louisiana appellate courts during the 1974-1975 term in *Hood Motor Co. v. Lawrence.*[57] The First Circuit Court of Appeal, alluding to the fact that the United States Supreme Court in *Mitchell* had stressed the judicial control of the Louisiana procedure as a factor distinguishing sequestration from the Florida replevin statute, held that the issuance of executory process upon the signature of the clerk of court was a violation of due process.[58] On certiorari, the Louisiana Supreme Court, "with some diffidence," reversed and sustained the validity of the Louisiana procedure when the writ is issued by the clerk.[59] Justice Tate, writing for a unanimous court, reasoned that the clerk, in issuing executory process, acts in a quasi-judicial function, and is under the same duty imposed upon the judge to determine whether a legal basis for the pre-judgment seizure is established by the plaintiff. *Mitchell,* the court concluded, required judicial control by a state official, not necessarily control by a judge.

The court's diffidence may be well-founded. If the purpose of the *Sniadach-Fuentes* doctrine is to minimize the possibilities of wrongful deprivation before notice and an opportunity to be heard, then the state official to whom the matter is presented should have the competence, as well as the duty, to determine whether there has been a compliance with the law authorizing pre-judgment seizure. It is futile to argue that a clerk, usually a layman, has the competence to determine if there is sufficient authentic evidence of the plaintiff's right to use executory process, a conclusion not always apparent to a Louisiana attorney.

A companion question as yet unanswered is the validity under the *Sniadach-Fuentes* doctrine of Louisiana's resident attachment procedure.[60] Sequestration issues only where the

(2) an order for the issuance of . . . a writ . . . of sequestration. . . ." *Id.* art. 281 (provisions of article 283 do not apply to clerk of the District Court for Orleans Parish).

57. 307 So. 2d 143 (La. App. 1st Cir. 1974).

58. *Id.*

59. 320 So. 2d 111 (La. 1975).

60. LA. CODE CIV. P. art. 3542 (writ of attachment may be obtained in an action for money judgment against a resident, regardless of the origin of the claim).

plaintiff claims ownership or a mortgage or privilege on the property subject to seizure;[61] thus the seizing creditor has or claims an interest in the property that antedates the suit. Resident attachment in Louisiana may issue although the plaintiff does not assert a pre-suit interest in the property attached. It is arguable that the protection afforded the defendant against erroneous pre-judgment seizure should be greater when the creditor has no pre-suit interest in the property seized. The United States Supreme Court, since advancing the *Sniadach-Fuentes* doctrine, has not upheld a pre-judgment seizure in which the plaintiff did not have a pre-suit interest in the property seized.

Louisiana Code of Civil Procedure article 2635 provides, "The plaintiff shall submit with his petition [for executory process] the authentic evidence necessary to prove his right to use executory process. . . ." The language of the article seems to indicate clearly that the authentic evidence must exist at the time the order for executory process issues, but a recent decision of the Louisiana Supreme Court casts doubt upon that conclusion. In *American Bank & Trust Co. v. Carson Homes, Inc.*,[62] the act of mortgage, purportedly in authentic form, was in fact executed in the presence of only one witness; the other witness and the notary signed at a later time. The holder of the mortgage note proceeded by executory process, and the defendant sought to enjoin, urging that the mortgage was not in authentic form and thus the requirements of executory process had not been met. At the hearing for the injunction, the maker acknowledged execution of the mortgage. The supreme court, following established jurisprudence, held that parol evidence was admissible to establish that the act had not been executed in the presence of the notary and two witnesses and therefore was not an authentic act within the purview of Louisiana Civil Code article 2234.

Plaintiff argued that the acknowledgment by the maker at the hearing had the effect of an authentic act, and that executory process therefore was valid. Justice Barham, in dissent, supported this view, concluding that executory process was proper if the authentic evidence was furnished at any time *before the sale*.[63] The majority did not speak spe-

61. *Id.* art. 3571.
62. 316 So. 2d 732 (La. 1975).
63. *Id.* at 736 (Barham, J., dissenting).

cifically to this point, but by dicta raised hopes of such a conclusion. Rather than place its decision upon the obvious language of Louisiana Code of Civil Procedure article 2635 that the authentic evidence must accompany or be presented with the petition for executory process, the majority based its opinion that executory process was unavailable upon the conclusion that the acknowledgment by the debtor could produce only an *acknowledged* act, and since the property subject to foreclosure was immovable property, an *authentic* act was required. It is thus arguable that if the foreclosure is one against *movable* property, for which an acknowledged instrument is sufficient,[64] then a judicial acknowledgment at the hearing on the preliminary injunction may cure any prior formal defect in the execution of the chattel mortgage. Since such an acknowledgment will be readily available except in rare cases of perjury or forgery, the dicta of *American Bank* could precipitate an erosion of the requirement of submission of an acknowledged instrument with the petition for executory process on movable property.

REAL ACTIONS

The redactors of the Louisiana Code of Civil Procedure combined the action to establish title and the pre-code petitory action into a single action, the present petitory action,[65] and imposed upon the plaintiff in a petitory action brought against a defendant in possession the burden of "making out his title" rather than simply proving a title better than that of the possessor.[66] The redactors, however, did not specifically abolish the action to remove a cloud from a title; the courts then held that the judicially-created remedy survived the codification and presented an alternative to the petitory action in those cases in which the defendant was in possession by virtue of a recorded deed.[67] The oversight, and the survival of the action to remove cloud, would be of little consequence unless it afforded a litigant a substantial procedural advantage not available through the petitory action.

In *Verret v. Norwood*,[68] decided during the recent term by

64. LA. R.S. 9:5353 (1950), *as amended by* La. Acts 1970, No. 113, § 1.

65. LA. CODE CIV. P. art. 3651.

66. *Id.* art. 3653 (1).

67. Walmsley v. Pan American Petroleum Corp., 244 La. 513, 153 So. 2d 375 (1963); Shell v. Greer, 171 So. 2d 672 (La. App. 2d Cir. 1965).

68. 311 So. 2d 86 (La. App. 3d Cir.), *cert. denied*, 313 So. 2d 842 (La. 1975).

the Third Circuit Court of Appeal, the court ruled that if title is at issue in an action to remove a cloud from title, the burden of proof upon the plaintiff is the same as it would be if the petitory action had been brought. This sensible decision is laudable and perhaps is the next best thing to the judicial abrogation of the action to remove cloud on title, a task which, as the court pointed out in *Verret*, belongs to the supreme court. When that court denied writs in *Verret*, three justices indicated they were willing to reach such a conclusion.[69]

In *Pure Oil Co. v. Skinner*,[70] the Louisiana Supreme Court held that when a petitory action is brought against a defendant who is in possession, the plaintiff must "make out his title thereto" by proving a title "good against the world." But how does one prove such a title? Two methods seem beyond dispute: the plaintiff may establish record title back to the sovereign or he may prove a prescriptive title.[71] But what if the plaintiff merely traces the titles of both claimants back to the same vendor and shows a superior deed out of that common author? The Third Circuit Court of Appeal has ruled that the "common authorship" method is sufficient to establish title good against the world.

In *Clayton v. Langston*,[72] the defendant was in possession; the plaintiff then established record title back to 1922 and to the common ancestor of plaintiff and defendant. The Third Circuit Court of Appeal held that this proof of title back to a common ancestor shifts the burden to the defendant to prove his title. In so doing, the court apparently concluded that the "common author" title is "title good against the world" sufficient to satisfy the *Skinner* rule. This rule, while it may be pragmatically sound, is theoretically disturbing. In *Skinner* the court held that the choices were two, prove a title good against the world or make out a better title. If one is required to place the "common author" doctrine in one of

69. Justice Barham dissented from the denial of the writ stating that the court should expressly overrule *Walmsley*, since Louisiana no longer has an action to remove cloud from title. Justices Tate and Dixon concurred in the denial because the "result" was correct, but agreed, with Justice Barham that the action to remove a cloud was "probably not authorized since the enactment of the 1960 Code [of Civil Procedure]." 313 So. 2d 842 (La. 1975).

70. 294 So. 2d 797 (La. 1974).

71. *Id.* at 799: "Respondents, therefore, have not established either valid record title *or* prescriptive title to the property in dispute" (emphasis added).

72. 311 So. 2d 74 (La. App. 3d Cir. 1975).

these two categories, it is obvious that it is only a better title. Until the supreme court speaks to the effect of the *Skinner* doctrine upon the "common author" rule, uncertainty will continue.

RES JUDICATA

The Louisiana doctrine of res judicata differs from that of the common law. The latter is broad, and generally bars subsequent relitigation of all matters which might have been raised by the prior litigation, while the Louisiana version limits the preclusive effect of a judgment to those matters that actually were litigated.[73] In its only expression on the subject during the 1974-75 term, the Louisiana Supreme Court reaffirmed this narrow interpretation of the Louisiana doctrine of res judicata and again cast doubt upon the existence in this state of its doctrinal companion, collateral estoppel.[74]

In *Sliman v. McBee*,[75] plaintiff sold property to defendant, the balance of the purchase price being represented by four notes; plaintiff did not take a mortgage or reserve a vendor's lien, however. Subsequently, plaintiff filed suit seeking recognition of a vendor's lien and also seeking rescission of the sale for non-payment of the purchase price. The matter was compromised by payment of the first note and an agreement by the purchasers to pay the remaining notes. The purchasers then mortgaged the property to a bank, which subsequently foreclosed. The seller intervened, seeking judgment for the balance of the remaining notes and asserting a vendor's lien on the property. Judgment was rendered recognizing the debt to seller but rejecting her claim to a vendor's lien; that judgment became final. The seller (plaintiff) then filed the instant suit seeking to rescind the sale for non-payment of the remaining notes. The lower court dismissed the suit, and the court of appeal affirmed,[76] finding that through certain language in the act of sale the seller had waived her right to rescind the sale as well as her vendor's lien. The Louisiana Supreme Court granted writs and reversed.[77] The court first found that the seller had not waived the right to rescind by

73. LA. CIV. CODE arts. 2285-86; Quarles v. Lewis, 226 La. 76, 75 So. 2d 14 (1954). *See also* Sliman v. McBee, 311 So. 2d 248, 253 (La. 1975).

74. Sliman v. McBee, 311 So. 2d 248 (La. 1975).

75. 300 So. 2d 585 (La. App. 3d Cir.), *rev'd*, 311 So. 2d 248 (La. 1975).

76. *Id.* at 589.

77. 311 So. 2d 248 (La. 1975).

the language of the act of sale; it then held that the right to rescind for non-payment of the remaining three notes was not barred by res judicata, arising from either the compromise agreement or the final judgment in the second suit.

The court pointed out that res judicata does not apply in Louisiana unless there is an identity of parties, demands and causes. Cause, as used in the res judicata sense, is not the motive for the obligation, but is the "legal obligation upon which the action is founded."[78] Since each note constituted a separate obligation, there was no identity of causes between the first and second suits. Although the second and third suits were based upon the same notes, there was no identity of demands because the demands for payment of the purchase price and for rescission for non-payment of the purchase price are separate.

The court found the alternative plea of estoppel by judgment[79] inapplicable but carefully avoided an express holding that the doctrine exists in Louisiana. While it is frequently assumed that estoppel by judgment was introduced into Louisiana in *California Company v. Price*,[80] subsequent supreme court cases have cast doubt upon that assumption, and one intermediate appellate court has refused to apply it.[81] Collateral estoppel bars relitigation of facts which were adjudicated in a prior action between the parties. The application of collateral estoppel would produce a broader preclusive effect to prior judgments than that now provided by the narrow Louisiana version of res judicata, thus undercutting the supreme court's restricted application of the latter doctrine.

78. *Id.* at 255.

79. The court used the term "judicial estoppel" instead of "estoppel by judgment" (sometimes called collateral estoppel) but it is clear that the court was referring to the latter doctrine. The term "judicial estoppel" should be used to refer to the rule which prohibits parties from changing their position during litigation once they have initially taken a particular position in their pleadings. *See* Comment, *Preclusion Devices in Louisiana: Collateral Estoppel*, 35 LA. L. REV. 158 n.3 (1974).

80. 234 La. 338, 99 So. 2d 743 (1957).

81. Bordelon v. Landry, 278 So. 2d 173 (La. App. 4th Cir. 1973); Johnson v. Fidelity & Cas. Co., 201 So. 2d 177 (La. App. 4th Cir. 1967); Comment, *Preclusion Devices in Louisiana: Collateral Estoppel*, 35 LA. L. REV. 158 (1974). To the same effect is a third circuit case, *Johnson v. Sweat*, 265 So. 2d 801 (La. App. 3d Cir.), *cert. denied*, 267 So. 2d 211 (1972).